

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

August 23, 2004

Opinion No. 04-135

Recall Election for City Officials

QUESTIONS

1. Does an individual or an association, committee, or other group advocating the recall of one or more local elected officials have to register with a county election commission as a single measure committee or a political action committee?

2. If the answer to Question 1 is yes, what penalties or sanctions apply to an individual, association, committee, or other group failing to register?

3. This Office has previously concluded that Tenn. Code Ann. § 6-53-108(a) supersedes conflicting recall petition requirements found in the Chattanooga City Charter. Op. Tenn. Att’y Gen. 87-138 (August 11, 1987). Do the requirements for recall petitions contained in Tenn. Code Ann. § 6-53-108(a) supersede all municipal charter provisions addressing such petitions?

4. If the answer to Question 3 is yes, then, Tenn. Code Ann. § 6-53-108(a) requires recall petitions to include “one or more specific grounds for removal.” Would a petition containing a statement that a local elected official “should be recalled because of his/her abuse of official power and his/her disregard for the best interest of city residents” satisfy the requirement under Tenn. Code Ann. § 6-53-108(a)?

5. Court rulings suggest that an elected official subject to recall cannot file suit to challenge the validity of a recall election. Rulings also suggest that county election commissioners may not be subject to suit for certifying a potentially invalid recall election. Once recall petitions have been accepted by an election commission, who has standing to file suit challenging the validity of a recall election, and who would be named as defendant?

6. May an elected official who is named in a recall petition assert in court that his or her respective municipal charter concerning recall petitions is superseded by state law when this official has received the benefits conferred by the charter, or would the official be estopped from challenging the charter provision on equitable grounds?

7. Would the Declaratory Judgment Act, Tenn. Code Ann. §§ 29-14-101, *et seq.*, provide a cause of action for an elected official who is subject to a recall election, when the issue raised is the applicability of the requirement for recall petitions contained in Tenn. Code Ann. § 6-

53-108(a) in a municipal election where the municipal charter requires only a statement of general grounds for recall?

OPINIONS

1. Disclosure rules do not apply to an individual advocating the recall of one or more local officials. A group or corporation that makes expenditures or receives contributions to support or oppose a measure within the meaning of Tenn. Code Ann. §§ 2-10-101, *et seq.*, is subject to disclosure requirements. The recall of an elected official is a “measure” within the meaning of this statutory scheme. The Registry of Election Finance has the jurisdiction to administer and enforce the disclosure requirements. Questions regarding the applicability of the disclosure requirements to any particular group should be referred to the Registry.

2. Because the disclosure requirements do not apply to an individual, no penalties or sanctions for an act that would otherwise be a violation would apply to an individual. A county administrator of elections may impose civil penalties for certain “class 1 offenses,” including violations of the disclosure requirements, as set forth in Tenn. Code Ann. § 2-10-110(a)(1). The county administrator of elections must notify the Registry of Election Finance of “class 2 offenses” as described in Tenn. Code Ann. § 2-10-110(a)(2), and the Registry may impose sanctions under that statute. Under the statute, it is not entirely clear that the Registry of Election Finance may levy a penalty for a class 2 offense against a single-issue political campaign committee. Because the Registry has the jurisdiction to administer and enforce the disclosure requirements, questions about applicable penalties should be referred first to that agency.

3. Whether Tenn. Code Ann. § 6-53-108 supersedes a municipal charter provision on recall depends on whether the municipal charter conflicts with it. The statute supersedes any charter provision that conflicts with it.

4. We think a court would conclude that a petition stating that an official “should be recalled because of his/her abuse of official power and his/her disregard for the best interest of city residents” satisfies the requirement that the petition state specific grounds for recall.

5. Questions 5, 6, and 7 all concern a theoretical lawsuit in which this Office may represent one or more of the parties. This opinion is not intended to be an outline of the position this Office may take in any lawsuit. Our decisions regarding litigation strategy will be based on the particular complaint, the parties named, and all other relevant facts, circumstances, and law.

Under Tennessee cases, it is not clear whether an official who is the subject of the petition, or, in fact, any voter in the city, has standing to bring an action to determine whether a recall petition for a city official complies with the requirements of Tenn. Code Ann. § 6-53-108. In a lawsuit to challenge the county election commission’s decision to place a recall issue on the ballot, it seems that the county election commission would be a logical defendant. *See, e.g.*, Tenn. Code Ann. §§ 27-9-101, *et seq.* (review of boards and commissions). But the Tennessee Supreme Court has

refused to enjoin a county election commission from holding a recall election against a challenge that the commissioners had not properly performed certain discretionary duties. It should also be noted that the Tennessee Coordinator of Elections has the duty to “[a]uthoritatively interpret the election laws for all persons administering them.” Where the Coordinator is made a party, a court is likely to defer to that official’s interpretation of the requirements for the petition. Other appropriate defendants would depend on the terms of the complaint and the relief sought.

6. Depending on the terms of the complaint and the relief sought, we think a court would conclude that a city official is not estopped from asserting a claim that the recall provision in the city charter is superseded by general state law. As discussed above, however, it is not clear whether a Tennessee court would find that an official has standing to challenge the decision of a county election commission to place a recall issue on the ballot.

7. A definitive answer to this question could only be provided by a court of law and would depend on the terms of the complaint and the relief sought. For example, the Tennessee Court of Appeals has found that a declaratory judgment action against a state official may be barred by sovereign immunity. *Spencer v. Cardwell*, 937 S.W.2d 422 (Tenn. Ct. App. 1996), *p.t.a. denied* (1996).

ANALYSIS

1. Registering as a Political Campaign Committee

The first question is whether an individual or an association, committee, or other group advocating the recall of one or more local elected officials has to register with a county election commission as a single measure committee or a political action committee. Disclosure requirements for political action committees appear in Tenn. Code Ann. §§ 2-10-101, *et seq.* Under Tenn. Code Ann. § 2-10-105(b):

Each candidate for local public office or political campaign committee for a local election shall file with each county election commission of the county where the election is held a statement of all contributions received and all expenditures made by or on behalf of such candidate or such committee. The . . . statement of a political campaign committee for a local election shall include the date of each expenditure which is a contribution to a candidate.

These rules do not apply to an individual who is not a candidate for local public office. Whether an organization or group must comply with the disclosure requirements depends on whether it falls within the definitions contained in the statutory scheme. The term “election” means “any general, special or primary election or run-off election, *held to approve or disapprove a measure* or nominate or elect a candidate for public office[.]” Tenn. Code Ann. § 2-10-102(5) (emphasis added). It is the opinion of this Office that a proposition on the ballot directing the recall of an elected official

would qualify as a “measure” within the meaning of this statute. Thus a political campaign committee for a local election to approve or disapprove a measure is required to file a report of all contributions received and all expenditures made by or on behalf of the committee. Under Tenn. Code Ann. § 2-10-102(12), “political campaign committee” means:

(A) A combination of two (2) or more individuals, including any political party governing body, whether state or local, *making expenditures*, to support or oppose any candidate for public office or *measure*, but does not include a voter registration program;

(B) Any corporation or other organization *making expenditures*, except as provided in subdivision (4), *to support or oppose a measure*; or

(C) Any committee, club, association or other group of persons which *receives contributions or makes expenditures* to support or oppose any candidate for public office *or measure* during a calendar quarter in an aggregate amount exceeding two hundred fifty dollars (\$250)[.]

(emphasis added). “Expenditure” means a “purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made for the purpose of influencing a measure or the nomination for election or election of any person to public office[.]” Tenn. Code Ann. § 2-10-102(6)(A). “Contribution” includes “any advance, conveyance, deposit, distribution, transfer of funds, loan, loan guaranty, personal funds of a candidate, payment, gift, pledge or subscription of money or like thing of value, and any contract, agreement, promise or other obligation, whether or not legally enforceable, made for the purpose of influencing a measure” Tenn. Code Ann. § 2-10-102(4). Several types of services and activities are excluded from the definition of “contribution.”

The definition of “political campaign committee” cited above contains some ambiguities. The Registry of Election Finance has the jurisdiction to administer and enforce the disclosure requirements. Tenn. Code Ann. § 2-10-205(1). Questions regarding the applicability of the disclosure requirements to any particular group should be referred to the Registry.

2. Penalties for Violating the Disclosure Requirements

The next question is what sanctions and penalties apply to an individual or group that violates the disclosure requirements. Because the disclosure requirements do not apply to an individual who advocates for the recall of a local elected official, that individual is not subject to any penalties for failing to observe them. A county administrator of elections may impose civil penalties for certain “class 1 offenses,” including violations of the disclosure requirements, as set forth in Tenn. Code Ann. § 2-10-110(a)(1). The county administrator of elections must notify the Registry of Election Finance of “class 2 offenses” as described in Tenn. Code Ann. § 2-10-110(a)(2), and the Registry

may impose sanctions under that statute. The treasurer of a multicandidate political campaign committee is personally liable for any civil penalty levied by the Registry of Election Finance.

Under the statute, it is not entirely clear that the Registry of Election Finance may levy a penalty for class 2 offenses against a single-issue political campaign committee. Because the Registry has the jurisdiction to administer and enforce the disclosure requirements, questions about applicable penalties should be referred first to that agency.

3. Effect of Tenn. Code Ann. § 6-53-108

The next question is whether Tenn. Code Ann. § 6-53-108 supersedes all municipal charter provisions addressing such recall petitions. This statute provides:

(a) The charter of any municipality to the contrary notwithstanding, any petition or petitions required to be filed under a municipal charter in order to cause a recall election of whatever type or kind, whether in the nature of a new municipal election prior to the next regular election or otherwise, shall contain one (1) or more specific grounds for removal.

(b) This section shall be construed to be remedial and shall be given a liberal and retroactive effect where legally permissible.

It should be noted that, as a general matter, any governmental entity having a charter provision for a petition for recall must also meet the requirements of Tenn. Code Ann. § 2-5-151. A contrary charter provision of a municipality or county that is enacted after July 1, 1997, will control with respect to the minimum number of signatures required in a petition and to provisions relating to the seventy-five-day deadline for filing of a petition after final certification by the county election commission. Tenn. Code Ann. § 2-5-151(j). Whether either of these statutes supersedes a municipal charter provision on recall depends on whether the municipal charter conflicts with either of these statutes. Any charter provision that conflicts with Tenn. Code Ann. § 6-53-108 is superseded by that statute. Op. Tenn. Att’y Gen. 87-138 (August 11, 1987).

4. Requirement for Specific Grounds for Recall under Tenn. Code Ann. § 6-53-108

The next question is whether a petition containing a statement that a local elected official “should be recalled because of his/her abuse of official power and his/her disregard for the best interest of city residents” satisfies the requirement under Tenn. Code Ann. § 6-53-108(a). Under this statute, a petition for recall “shall contain one (1) or more specific grounds for removal.” This Office has concluded that this statute does not limit the grounds for removal that must be stated in the recall petition to any particular type. Op. Tenn. Att’y Gen. 87-138 (August 11, 1987). Thus, any reasons that the petitioners believe justify recall are sufficient. For this reason, we think a court would conclude that a petition stating that an official “should be recalled because of his/her abuse of official

power and his/her disregard for the best interest of city residents” satisfies the requirement that the petition state specific grounds for recall.

5. Standing to Challenge Recall Petition

Questions 5, 6, and 7 all concern a theoretical lawsuit in which this Office may represent one or more of the parties. *See* Tenn. Code Ann. § 2-12-101 (Attorney General or attorney chosen by Attorney General represents county election commissioners in legal proceedings attacking a state law or presenting a question concerning state or federal election); Tenn. Code Ann. § 2-11-202(a)(4) (the Tennessee Coordinator of Elections shall “[a]uthoritatively interpret the election laws for all persons administering them”). This opinion is not intended to be an outline of the position this Office may take in any lawsuit. Our decisions regarding litigation strategy will be based on the particular complaint, the parties named, and all other relevant facts, circumstances, and law.

The next question concerns who has standing to file suit challenging the validity of a recall election once a recall petition has been accepted by a county election commission and who should be named as the defendant. The request states that court rulings suggest that an elected official subject to recall cannot file suit to challenge the validity of a recall election. The request does not state to which rulings it refers. The only case on the subject appears to be *Roberts v. Brown*, 43 Tenn.App. 567, 310 S.W.2d 197 (1957), *p.t.a. denied* (1958). In that case, some individuals who had signed a recall petition sued the city clerk for a writ of mandamus when she refused to certify it to the county election commissioners. The commissioner whose recall was sought intervened as a defendant. The commissioner raised two constitutional challenges to the recall provision in the city charter. The Court found that neither the city clerk nor the commissioner could raise constitutional challenges to the city charter, since they had accepted the benefit of holding office under it. 310 S.W.2d at 212. The Court stated, “[c]onsequently, they cannot be heard to contest the validity of that part of it which is objectionable to them, even if such contest could be successfully made by someone, not prohibited, as they are, from making such contest.” *Id.* But the Court did not state that the commissioner and the clerk lacked standing to raise other issues with regard to the petition. In fact, the Court found that the individuals who brought the lawsuit, city voters who had signed the recall petition, were not required to show any special interest in the subject matter of the litigation in order to bring it.

A court is unlikely to find that, under *Roberts v. Brown*, an official who is the subject of a recall petition cannot bring an action challenging its compliance with applicable statutes. In *Roberts*, the Court found that a city official could not challenge the constitutional validity of the very charter under which he had accepted office. But the Court did not rule that the commissioner could not challenge the petition on other grounds. On the other hand, in *State ex rel. Hammond v. Wimberly*, 184 Tenn. 132, 196 S.W.2d 561 (Tenn. 1946), the Tennessee Supreme Court refused to enjoin a recall election on several grounds, including that voters ordinarily have no special interest in the matter as to justify their seeking an injunction against an election. The Court noted that “no one can tell what the result of an election will be and no complainant can say that he will be adversely affected by an election.” 196 S.W.2d at 562, *quoting Buena Vista School District v. Board of*

Election Commissioners of Carroll County, 173 Tenn. 198, 116 S.W.2d 1008 (1938); *see also Moyers v. Sherrod*, 525 S.W.2d 126 (Tenn. 1978). For this reason, it is not clear whether an official who is the subject of the petition, or, in fact, any voter in the city, has standing to bring an action to determine whether a recall petition for a city official complies with the requirements of Tenn. Code Ann. § 6-53-108.

The request also states that rulings suggest that county election commissioners may not be subject to suit for certifying a potentially invalid recall election. Again, the request does not specify to which rulings this statement refers. The concern appears to stem from the case of *State ex rel. Hammond v. Wimberly*, 184 Tenn. 132, 196 S.W.2d 561 (Tenn. 1946). In that action, the Tennessee Supreme Court refused to issue an injunction to restrain the Knox County Election Commission from conducting a recall election in Knoxville. The plaintiffs in the action claimed that the election commissioners had failed adequately to perform several functions with regard to the recall petition, including removing defective pages and signatures. The Court found that courts of equity in Tennessee ordinarily will not enjoin the holding of an election. The Court noted, further, that at least some of the duties were discretionary and that the commissioners were the proper judges of the sufficiency of the recall petition. The Court declined, therefore, to review the commissioners' certification.

Depending on the particular charter provision involved, a court could reach a similar conclusion with regard to any lawsuit challenging the decision of a county election commission to place a recall issue on the ballot. Further, under Tenn. Code Ann. § 2-11-202(a)(4), the Coordinator of Elections must “[a]uthoritatively interpret the election laws for all persons administering them.” (Emphasis added). Where the Coordinator is made a party to a lawsuit challenging a recall petition, a court is likely to defer to that official’s interpretation of the requirements for the petition.

6. Claim that City Charter has been Superseded

The next question is whether a city official may assert in court that the recall provision in the charter under which the official holds office is superseded by general state law. This concern appears to stem from the ruling in *Roberts* prohibiting city officials from challenging the constitutionality of a recall provision in the city charter under which they held office. A claim that the city charter has been superseded by general law, however, is not a challenge to the validity of the statute. Instead, it is part of a lawsuit regarding the proper interpretation of recall election laws. For this reason, we think a court would conclude that a city official is not estopped from asserting a claim that the recall provision in the city charter is superseded by general state law. As discussed above, however, it is not clear whether a Tennessee court would find that an official has standing to challenge the decision of a county election commission to place a recall issue on the ballot.

7. Action under the Declaratory Judgment Act

The last question is whether Tenn. Code Ann. §§ 29-14-101, *et seq.*, provides a cause of action for an elected official who is subject to a recall election, when the issue raised is the

applicability of the requirement for recall petitions in Tenn. Code Ann. § 6-53-108(a). Again, a definitive answer to this question could only be provided by a court of law and would depend on the terms of the complaint and the relief sought. For example, the Tennessee Court of Appeals has found that a declaratory judgment action against a state official may be barred by sovereign immunity. *Spencer v. Cardwell*, 937 S.W.2d 422 (Tenn. Ct. App. 1996), *p.t.a. denied* (1996).

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Robert S. McKee
State Representative
206 War Memorial Building
Nashville, TN 37243-0123